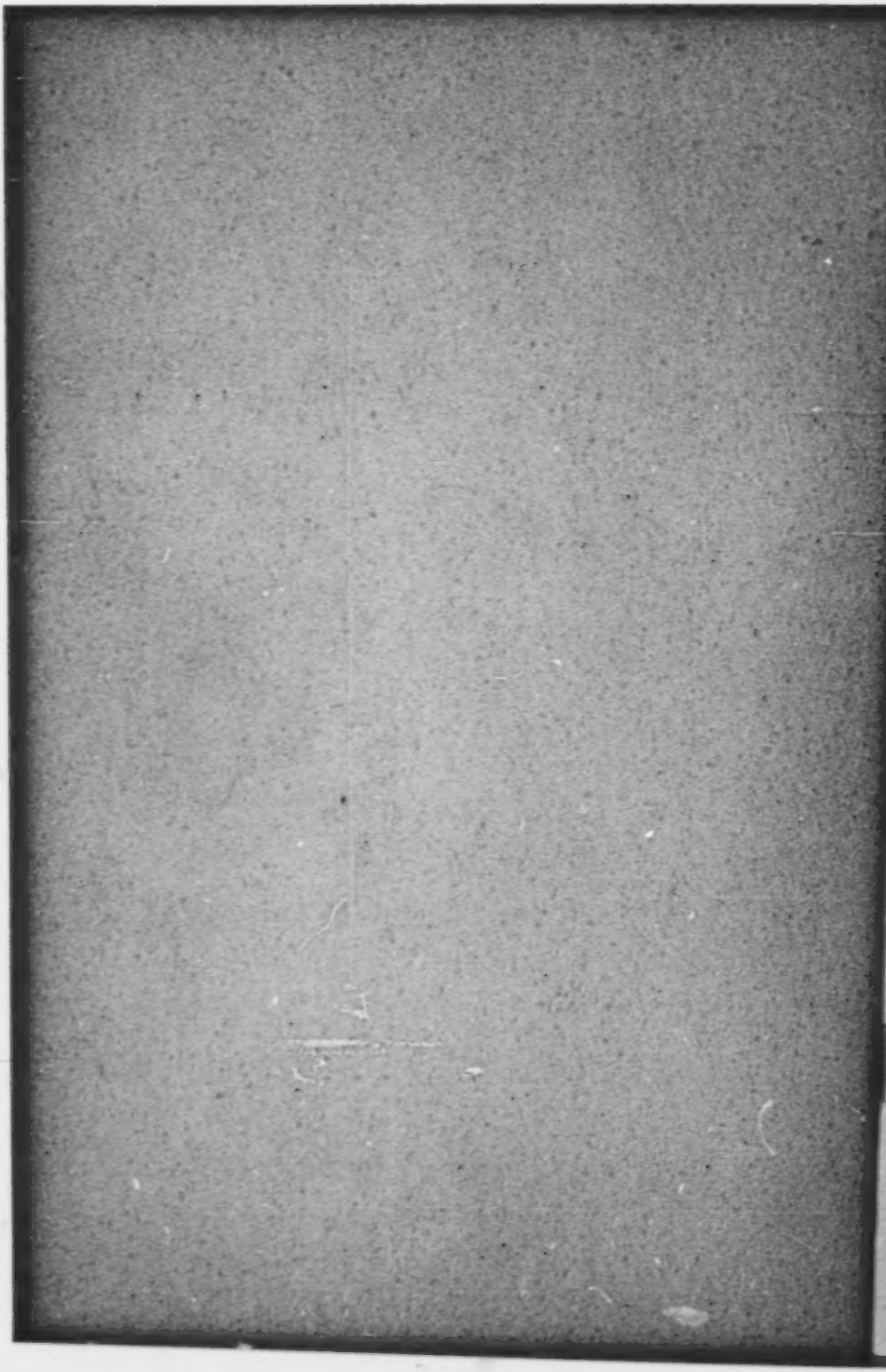

SUPREME COURT, U. S.

FILE

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1989

ERNEST SIMON, et al.,

Petitioners,

v.

ESTATE OF W. P. ALLEN, DECEASED, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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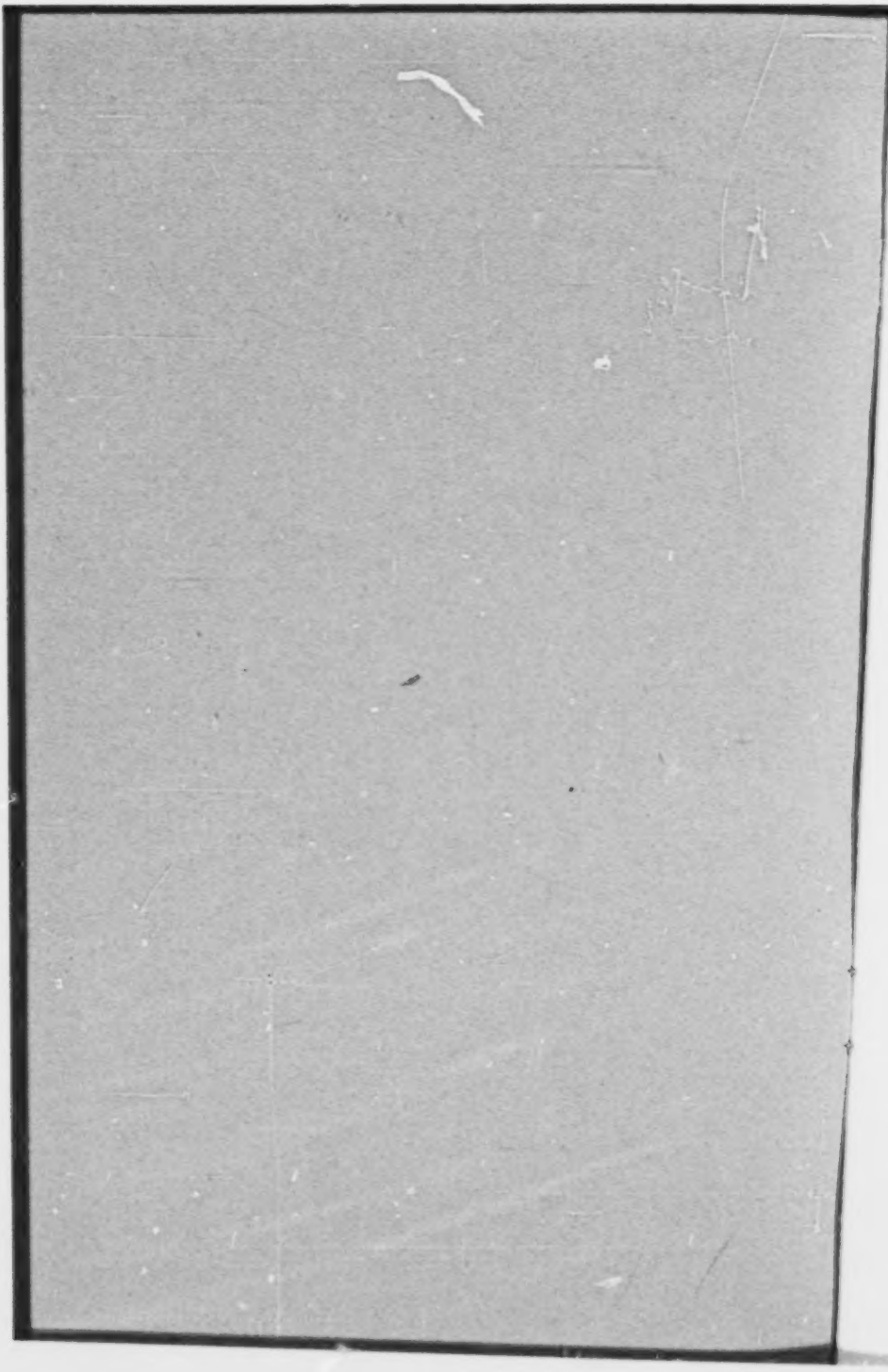

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PETITIONERS' REPLY BRIEF

Respondents in their briefs in opposition have raised a number of arguments not covered by petitioners in their brief, and to which petitioners desire to respond:

1. As to jurisdiction, respondents make the following arguments:

(a) *Waiver* – It is argued that petitioners waived their rights to raise the federal questions by not presenting them to the trial judge.

Actually, the deprivation of constitutionally protected rights did not occur until after the jury verdict on the

special issues. It is the action of the trial court in granting judgment based on those findings, and the appellate court in making the first findings in the case, that gave rise to the errors asserted. Particularly under the circumstances existing here, waiver is not to be lightly inferred, and nothing done by the petitioners either expressly or by implication constituted such a waiver.

(b) *Preservation* – It is argued that no federal issues were raised except in the petition for rehearing in the court below. The liberty is being taken to quote one passage from page 42 of the petitioners' brief in the court below in support of their Application for Writ of Error:

> The Trial Court found in favor of Allen and the Bank in fact and law, without specifying any particular causes of action, and causes of action for fraud, bad faith and conspiracy were included. Such a finding would constitute a stain on the character and reputation of Petitioners, and affect their substantive rights to certain legal benefits, such as the possibility of a discharge in bankruptcy, and the ability to obtain licenses and permits requiring evidence of unblemished character. Justice requires that the basis for the judgment be stated, and the failure to do so in this type of case could well constitute a denial of fundamental due process. Cf. *American Railway and Express Company v. Kentucky*, 273 U.S. 269, 273, *United Transport Union v. State Bar of Michigan*, 401 U.S. 576, 583, and *Williams v. Tooke*, 108 F.2d 758.

The quotation from the *Cardinale* case relied on by respondent bank was based on a situation where the sole federal question urged had never been raised in the state courts. The *Zucht* case, cited by the respondent estate, involved a compulsory vaccination ordinance chal-

lenged not as arbitrary but based on the broad discretion granted for purposes of public health. The Court held that this issue could not be raised by writ of error – only by petition for certiorari. Neither case appears applicable to the present case.

In the present case the trial court made no findings, and in no manner indicated that the counts of fraud and conspiracy, which were not argued to the jury or the court, were included in the judgment. It was only in respondents' briefs on appeal that there was any mention made of these counts. The first statement as to the basis of the judgment was contained in the opinion on appeal.

The *Herndon* case cited by respondent estate brings out the recognized exception to the rule as to raising of federal questions on rehearing; namely, where the questions arise for the first time in the appeal itself, and could not have been anticipated. Both the majority and dissenting opinions cite as authority the cases of *Saunders v. Shaw,* 244 U.S. 317, 320, *Missouri ex rel. Missouri Gas Company v. Gehner,* 281 U.S. 313, 320, *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677, 678, *American Security Co. v. Baldwin,* 287 U.S. 156, and *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 367.

2. The arguments of respondents place great emphasis on the finding of the jury as to the existence of a sale. It is not that finding that petitioners challenge, but its use by the trial court, *ipso facto,* as the basis for imposing liability on petitioners under the sales warranty provisions of the Uniform Commercial Code, in the face of the specific statement in that Code that the sales provisions do not apply to transactions which, although in the form of sales, are intended to operate only as security trans-

sactions (Sections 2.102 and 9.102, set out in full in Appendix B to Petition for Writ of Certiorari). Respondents in their briefs in the court below admitted, as used in the opinion on appeal, that the transaction was simply "structured" as a sale, and it is difficult to believe that they seriously contend that it was a sale in anything other than form.

The respondent estate argues that petitioners have distorted the record by asserting that the transaction was a financing transaction, and that petitioners have refused to give record references to support such an assertion because there are none. This respondent itself spoke in its brief in the court below of petitioners and Allen having "structured the transaction as a sale", the very situation covered by sections 2.102 and 9.102. Petitioners have raised issues of law only, but in light of the allegation of distortion, petitioners submit as Appendix A hereto a summarization of the testimony of witnesses and exhibits from the Statement of Facts prepared for appeal purposes. Petitioners' position is that resolution of such fact issues is not necessary to the consideration of the legal issues they have raised, and these fact issues have no place in the consideration of these legal issues.

3. Respondent bank denies the existence of any indication in the record that the Senior Vice President of the respondent bank, Henry Oliver, had any idea the transaction was anything other than a sale. While here again petitioners' position is that the attempt to introduce a fact issue is unavailing, since their issues are all legal, and based not on the jury special findings, but rather the subsequent actions of the courts below, they would point out that Mr. Oliver testified at trial as follows (SF 213):

Q. As far as you and the Bank were concerned, the request to put all of the Behring indebtedness in Mr. Allen's account came from Mr. Allen? A. Yes.

Q. And Mr. Simon not anyone else had ever requested that this be done by the Bank? A. No. Mr. Simon was not at the meeting.

It is quite apparent, as set out in the Petition, that petitioners played no part in the working out of the transaction substituting Allen for petitioners as financing creditor for Behring as the result of the meeting between Oliver, Behring, Allen and Allen's office manager on September 13, 1966 at the Bank; and the bank, through Mr. Oliver, was fully aware of the nature of the transaction, while petitioners were not even consulted. The elements of a sale for purposes of the imposition of the warranty provisions of the Uniform Commercial Code did not exist.

4. Respondent bank takes the position on the fraud issue of being totally innocent of any knowledge as to Behring's actions. However, Behring's check in favor of the bank dated September 7, 1966, a week before the meeting, had been returned: a significant consideration if reliance is claimed as the basis for claiming any payment due from petitioners on the ground of fraud. In any event, no effort was made to press the fraud count, so that the issue should be moot. As to mutual mistake, avoiding a contract is not synonymous with the granting of damages, a concept not recognized by our law. Even if rescission had occurred, which is not the case, the bank would have been required to make a showing of unjust enrichment to obtain restitution. This was never done.

Irrespective of the foregoing, petitioners' claims do not require the determination of any of the fact issues attempted to be raised by respondents.

5. The respondent estate argues that an undue burden on interstate commerce has not been shown to invoke the Court's jurisdiction. It is submitted that being exposed to liability for warranties under the Uniform Commercial Code never intended to apply to security transactions, based simply on the structured form of the transaction as a sale, when it was clearly recognized to be a delivery of security paper following a change of financing arrangement, is such an undue burden.

The *Collins* case, cited by the respondent estate in support of its argument that this case does not call for the Court's intervention, involves the jurisdiction of the Arizona Industrial Commission over interstate bus lines. The Court held that the interest of the state was paramount in providing remedies for injuries committed within it, so long as it had not taken over the remedies in cases involving interstate buses as in the case of interstate railroad carriers. This is far different from the situation in the present case.

6. Respondent bank, in support of its contention that petitioners are confused between the purpose and the elements of due process, quotes from *Rogers v. Peck,* 199 U.S. 435, a case involving the question of whether habeas corpus would be justified in a situation where the type of confinement following conviction in a state proceeding had never been challenged in the courts of the state. It is submitted that the respondent misconceives petitioners' challenge as relating to the trial, rather than the action of the court following the special findings of the jury.

Similarly, respondent bank suggests that petitioners contend that they have been wronged in the same manner as occurred in *Manley v. Georgia,* 279 U.S. 1. Petitioners

cited that decision as a leading case indicating the position of the Court with respect to improper presumptions. The Court there held that the inference required by the statute was not restricted to any particular point or specific issue, and was as uncertain and vague as the terms "fraudulent" and "fraud", contrasted with "fairly", "legally", "honestly", and "in accordance with law", when used to describe the management of a bank. Here the term "sale" was applied to encompass what was in fact a security transaction structured as a sale, which by the terms of the Uniform Commercial Code was not to be considered a sale for purposes of the application of the sales provisions of the Code. The facts of the two cases are different, but the same rationale applies. Here the taking of the jury finding of sale in a non-technical sense, and applying the sales provisions of the Code without further findings, particularly in the face of the exclusionary language of the Code, was an improper presumption.

CONCLUSION

Respondents have attempted to raise issues not necessary to the consideration of the present petition, which involves important federal questions.

Respectfully submitted,

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EXHIBIT A

Summary of Trial Record, With References to Statement of Facts Prepared for Appeal

In about April, 1966, petitioners began some financing of Behring's cotton. Financing Agreements were entered into whereby Behring would borrow money from petitioners and deliver cotton warehouse receipts to petitioners to secure the loan. On advice of petitioners' Certified Public Accountants, these transactions had the appearance of a purchase by petitioners and sale by Behring but were actually financing transactions. Petitioners would in turn borrow the money from the Bank and pledge Behring's warehouse receipts to secure the loan. When Behring repaid the loans these transactions had the same appearance of a sale by petitioners and purchase by Behring or some other company who was actually a nominee of Behring. (Simon, SF 345-363, 414, 523-536; Box SF 825-826, 844-847; Oliver, SF 168-191; Pl's Exs 26 through 30, 34). All parties were aware on September 13, 1966, that these were financing transactions (Simon, SF 558-563; Oliver, SF 22, 29-39, 164-168, 185-186; 203-204, 241-244).

During August and the first part of September of 1966 Behring was indebted to petitioners to the extent of approximately $870,000.00 and petitioners held warehouse receipts and block receipts representing approximately 9,612 bales of Behring's cotton as security for the loans and in September acquired additional security in the form of a Deed of Trust to a cotton gin. (Pl's Exs. 5, 6, 7, 37, 38, 39 and 40; Simon, SF 451-457; Martin, SF 677-679). The great majority of these ware-

house receipts had been issued by the San Marcos Cotton Compress which Behring owned and this fact was known by all parties. (Oliver, SF 67-68, 199, 216; Simon, SF 423-425, 445-447).

Petitioners became concerned about the nature and extent of these transactions and began insisting that Behring repay the loans and take petitioners out of their financing arrangement (Pl's Exs 33 and 34; Simon, SF 412-441, 480-485, Box 827-837, 850-867). Behring agreed to pay the petitioners' loans but was financially unable to do so (Pl's Exs 5, 6, 7, 35, 36, 37, 38, 39 and 40; Oliver, SF 41-49; Simon, SF 451-457, 620-626).

At a meeting between Henry Oliver, Sr., Vice President of the respondent bank in charge of cotton loans, Allen and Behring on September 13, 1966, Allen (who held $550,000.00 of Behring's checks) and Oliver agreed that the Bank would loan Allen approximately 1.2 million dollars which Allen would in turn loan to Behring so that Behring could pay the $550,000.00 in checks held by Allen and pay the $870,000.00 he owed petitioners. Behring was to pledge with Allen, as security for the loan, certain items including "two or three" cases of cotton warehouse receipts (which he called "free collateral") and the warehouse receipts held by petitioners. Allen in turn was to pledge to the Bank the warehouse receipts and other Behring collateral as well as certain securities of his own. (Oliver, SF 48-54, 194-195, 201-204, 209-216). Petitioner had not requested or suggested such agreements be made, did not attend this meeting nor participate in any of the agreements reached therein although he was informed on September 13 of the decisions made. (Oliver, SF 53-54, 200-201; Simon, SF 628-629).

On September 14, 1966, the loan transactions took place as agreed and Allen paid off Behring's debt to petitioners and petitioners delivered the warehouse receipts to him. (Pl's Exs 5 through 12; I's Exs 3 through 12; Oliver, SF 54-59, 101-130).

Prior to these transactions Oliver raised a question with Allen as to whether there was any cotton behind these warehouse receipts. Allen asked Behring the same question and Behring assured him that there was cotton behind these receipts. Allen told Oliver of his conversation with Behring and expressed complete confidence in Behring. (Oliver, SF 67, 199-200, 216-217, 240-241).

It subsequently developed that, prior to September 14, 1966, Behring had caused a substantial amount of his cotton to be shipped out of his warehouse without cancelling the warehouse receipts and that the majority of the cotton represented by the warehouse receipts pledged by him to Allen, and in turn by Allen to the Bank (including a majority of the warehouse receipts received from petitioners), was not in the warehouse. (Pl's Exs 80 and 81; Oliver, SF 61-64, 71-72; Martin, SF 676-696, 737-742).

None of the parties (except Behring) had actual knowledge that the cotton was not in the warehouse on September 14, 1966, (Oliver, SF 68; Simon, SF 494-495).

CERTIORARI DENIED